

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

ORIGINAL

11-15-74
74-1261

(41763)

United States Court of Appeals
FOR THE SECOND CIRCUIT

SAMUEL TITO WILLIAMS,

Plaintiff-Appellee,

—against—

THE CITY OF NEW YORK,

Defendant-Appellant.

**APPELLANT'S PETITION FOR REHEARING OR
IN THE ALTERNATIVE REHEARING EN BANC**

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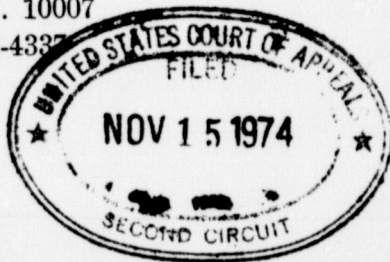


TABLE OF CONTENTS

	PAGE
ARGUMENT—	
Under New York law, as established by <i>Caminito v. City of New York</i> , 19 NY 2d 931 (1967), the instant action should have been dismissed as a matter of law	3
CONCLUSION	10

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—against—

THE CITY OF NEW YORK,

Defendant-Appellant.

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**To the Honorable Judges of the United States
Court of Appeals for the Second Circuit**

Appellant presents this petition for rehearing, or in the alternative for rehearing *en banc*, of this Court's decision of November 1, 1974, insofar as it affirmed that part of a judgment of the United States District Court for the Southern District of New York (Carter, J.), awarding plaintiff compensatory damages on a claim for malicious prosecution.

Rehearing or, in the alternative rehearing *en banc*, is sought pursuant to Rules 40 and 35 of the Federal Rules of Appellate Procedure, on the ground that the panel's decision, to the extent it affirms the judgment of the District Court, rests upon an erroneous application of the substantive law of New York. The panel acknowledged, and we agree, that the governing substantive law is the law of New York.

This case is of exceptional importance if, as we maintain, this Court erroneously interpreted the concededly applicable State law. With diversity jurisdiction available simply by the device of moving to another state, this decision opens up the possibility of any number of actions being commenced by persons once convicted in this State but later freed from prison, by collateral remedies, where, as was done here, the courts may invoke subsequently evolved constitutional standards.

The focus of our discussion is on one state case: *Caminito v. City of New York*, 25 AD 2d 848 (2nd Dept., 1966), affirmed without opinion, 19 NY 2d 931 (1967), where the New York courts granted summary judgment to the defendant on a record that, we contend, is juridically indistinguishable from the case at bar. This court relied upon a general statement of the New York law taken from the *Caminito* opinion. We believe we can establish from the *Caminito* record—not previously cited to this Court—that the instant case and *Caminito*, in all relevant respects, are indistinguishable.*

* The District Court recognized a need to distinguish the *Caminito* case and attempted to do so. We quoted this portion of the District Court's opinion and responded to it at pages 27 to 30 of our brief. We would only add here that, *if arguendo* the instant case is distinguishable from *Caminito*, it is even more distinguishable from those cases on which the District Court did rely; none of those involved an *affirmed* conviction set aside years later, on *habeas corpus*, based upon the application of newly evolved standards to undisputed facts.

ARGUMENT

Under New York law, as established by *Caminito v. City of New York*, 19 NY 2d 931 (1967), the instant action should have been dismissed as a matter of law.

Caminito v. City of New York, 25 AD 2d 848 (2d Dept., 1966) affd. without opinion 19 NY 2d 931 (1967) is, as far as we know, the only case in New York which involved a malicious prosecution claim brought by a plaintiff who had been convicted of a crime *and* where that conviction was affirmed on appeal. In *Caminito*, just as here, the conviction was obtained on the basis of a confession which, many years later, in a *habeas corpus* proceeding, was held, upon the application of subsequently evolved standards to undisputed facts, to have been improperly obtained. There, as here, the indictment was dismissed because, except for the confession, there was no evidence of guilt. Since *Caminito* is a fairly recent case and represents the view of the New York Court of Appeals, it must be either distinguished or followed.

The *entire* discussion in *Caminito* of the malicious prosecution claim is as follows (25 A D 2d at p. 849):

"In an action for malicious prosecution an indictment by a Grand Jury constitutes prima facie evidence of probable cause which may be overcome only by proof that a complete or truthful disclosure was not made to the Grand Jury (*Hopkinson v. Lehigh Val. R. R. Co.*, 249 N.Y. 296) and a conviction establishes prima facie probable cause for the prosecution unless plaintiff can show that the judgment was obtained by fraud, perjury, conspiracy or other undue means (*Simmonds v. Sowers*, 253 App. Div. 819). Plaintiff has not made any such requisite showing.

The indictment was upheld by the Court of Appeals. The conviction was obtained after trial at which all the facts surrounding the obtaining of the confession were revealed. A determination, 14 years after judgment, that plaintiff's constitutional rights were violated, is insufficient to expose defendant to an action for malicious prosecution for a proceeding which was properly conducted with probable cause under then-existing State law. There is also a failure to show malice. We are urged to infer malice on the premise of a lack of probable cause, but, as above indicated, such premise is not justified. These two essential elements of a cause for malicious prosecution being absent, such cause here must fail." *

In the case at bar the panel treated the issue briefly. It indicated that New York law "accords a conviction ultimately upset only the force of *prima facie* evidence of probable cause", citing *Laster v. Solotaroff*, 273 App. Div. 32 (1st Dept., 1947), a case which involved a conviction in Magistrate's Court which was reversed on direct appeal. Moreover, the *Laster* case does not indicate what is necessary to overcome the presumption. On this issue, the panel cited and quoted from *Caminito*: "... a conviction establishes *prima facie* probable cause for the prosecution unless plaintiff can show that the judgment was obtained by fraud, perjury, conspiracy or other undue means" (Opinion, p. 209). The panel went on to conclude that it was "within the jury's province to find 'undue means' [here]", and added that, if the "dubious police

* *Simmonds v. Sowers*, 253 App. Div. 819 (2d Dept., 1938), cited in the *Caminito* opinion, is a case where there was a conviction reversed on appeal. The appellate court held not only that the reversal did not establish a lack of probable cause, but also that plaintiff as a matter of law, failed to establish fraud, perjury, conspiracy or undue means.

practices" described by plaintiff did not qualify as "undue means", then it was "difficult to imagine what might" (Opinion, p. 209).

None of this discussion by the panel explains *why* summary judgment was granted to the City in the *Caminito* case or how this case is different.

There can be no doubt that Caminito alleged that his confession, and thereby his conviction, was obtained by "undue means". His complaint included the following: (*Caminito* Record, p. 15):

"19. Defendant, its agents, servants and/or employees, caused plaintiff to be falsely arrested and did falsely arrest plaintiff and caused plaintiff to be maliciously prosecuted; caused plaintiff to be persecuted and subjected to indignities and caused plaintiff to be falsely tried and convicted and incarcerated in prison for many years; did intentionally and maliciously assemble and present at the trial certain material evidence which defendant, its agents, servants and/or employees, knew were false; did falsely and fraudulently using fictitious and false witnesses, identify plaintiff as being a participant in the crime; did maliciously and intentionally procure illegal and wrongful confessions with the intent of obtaining the conviction of plaintiff despite his actual innocence; did wantonly, recklessly and wrongfully arrest and cause wrongful imprisonment of plaintiff with wanton disregard of his innocence; did permit certain false and misleading confessions to be presented at the trial, knowing of the falsity thereof and took no action to correct the same.

20. The said wrongful arrest, detention and imprisonment for approximately 22 years was made by de-

fendant without justification and without any reasonable cause for belief that plaintiff was in fact guilty of said crime."

In an affidavit, Caminito deposed: (*Caminito Record*, pp. 8-9):

"After my arrest, I was taken to the Detective Division at Lawrence Avenue, Brooklyn, New York. There, I was continuously interrogated by five or six police officers for approximately 5 hours until 2 A.M. the following morning. I was then locked in a cell in which there were no beds, pillows, blankets, spring, mattress or heat. At 10 A.M., with several detectives taking turns, the interrogation resumed and continued all day.

During this time I was kept incommunicado. No one was allowed to see me. Members of my family, friends and an attorney retained by my family called at the station house and tried to get information concerning my whereabouts. They were told by the police that I could not be reached. The police continued to refuse to allow me to communicate with my family. I was not allowed to see anyone other than the police and the District Attorney until I was arraigned some 40 hours after being taken into custody.

During the afternoon of May 12, 1941, two women and a man were brought to me in the station house. I was not told that they were detectives. Each of these three falsely pretended to identify me as the person who was seated at the wheel of the automobile at the time of the shooting which occurred in connection with the holdup.

The questioning continued throughout that day. About 9:00 P.M. that same day, 27 hours after having been taken into custody, I signed a confession. I gave

a second confession to a District Attorney a short time later. About 2:30 or 3:00 A.M. the following morning, I was first placed under arrest. I was brought before a Magistrate later that same day, more than 40 hours after having been first taken into custody.

I was convicted of murder in the first degree. On March 2, 1942, I was sentenced to life imprisonment. My conviction was based on the coerced confessions.

I served some 13 years in prison for a crime I did not commit, until released by the United States Court of Appeals. This Court in reversing the conviction [222 F. 2d 698] stated:

'These facts make it clear that the trial did not measure up to the standards prescribed by the due process clause of the Fourteenth Amendment. The confessions obtained by these loathesome means were no more evidence than if they had been forged. Absent then any admissible evidence of guilt the trial judge should have dismissed the indictment or directed a verdict of acquittal.'

That the above pleading and affidavit set forth allegations of "undue means" is clearly established in *United States ex rel. Caminito v. Murphy*, 222 F. 2d 698 (2nd Cir., 1955), where this court, by FRANK, J., referring to Caminito's testimony at the criminal trial that he confessed out of fear, noted: "Even without [such testimony] we are bound to infer, on the undisputed facts, that something of that sort actually happened" (222 F. 2d at pp. 701-702). The Court stressed that the undue means used on *Caminito* were indistinguishable from physical brutality, and that the means used just as clearly deprived him "of the will to resist," so that his confession "was no more evidence than if it had been forged" (222 F. 2d at pp. 700, 702).

After his indictment was withdrawn, Caminito, in his civil suit expressly relied on the holding in the habeas corpus proceeding (*Caminito Record*, p. 9). He maintained (and Special Term accepted [45 Misc 2d 24]) that a "confession" so obtained could not have been reasonably relied on; and, it being undisputedly the only evidence against him, the ensuing prosecution was without any probable cause. Despite these allegations (and this Court's opinion, relied upon by Caminito), the Appellate Division and the New York Court of Appeals held that the City was entitled to summary judgment dismissing Caminito's complaint, even though the New York courts were bound to accept Caminito's allegations as true.

The function of the Court on a motion for summary judgment is "issue finding rather than issue determination". *Sillman v. Twenty-Century Fox*, 3 NY 2d 395, 404 (1957). "It now seems well established that if the issue is fairly debatable a motion for summary judgment must be denied." *Stone v. Goodson*, 8 NY 2d 8, 12 (1960). "[On] a motion for summary judgment, the court is not to determine credibility but whether there exists a factual issue, or if arguably there is a genuine issue of fact." *Capelin Association v. Globe Mfg Corp.*, 34 NY 2d 338, 341 (1974). What cannot be side-stepped is this: that in granting summary judgment to defendant in the *Caminito* case, the appellate courts necessarily held, as a matter of law, that Caminito's allegations did not raise any triable issue of fact.

The reason that no issue of fact was raised by Caminito's pleading and affidavit, as the Appellate Division pointed out, is that "all of the facts surrounding the obtaining of the confession were revealed" at the criminal trial. (25 AD 2d at p. 849)

That is precisely the case here both in the pleadings and the testimony. The instant plaintiff stresses that the vic-

tim's brother, the only eyewitness to the crime, identified the murderer as someone other than the plaintiff. Yet, the police so informed the District Attorney, who made the decision to prosecute, and the eyewitness was presented by the prosecution at the criminal trial. Also, the plaintiff testified at the criminal trial, in as much detail as he did here, and also with some corroboration. There was *nothing* at this trial that had not been before the jury in the criminal case.

The several confessions were the only evidence of guilt and the jury necessarily found, beyond a reasonable doubt, that these confessions were voluntary and credible. That judgment was affirmed at every stage, and through reargument. Except on a writ of *habeas corpus*, that determination would have full collateral estoppel effect in any other proceeding. Indeed, even on *habeas corpus*, the court did not accept the claim of brutality but acted solely on *undisputed facts*.

Now the plaintiff seeks to relitigate the issue of coercion upon the very same evidence that was presented to, and *rejected* by the jury at the criminal trial, whose verdict was affirmed on appeal. If a conviction is not conclusive on the issue of probable cause in every case, then it is conclusive at least as to the same evidence that was considered at the criminal trial. That necessarily is the holding of *Caminito v. City of New York*, *supra*. On the need for some additional evidence, see also *Lambert v. Cory*, 23 AD 2d 731, (1st Dept. 1965), lv. den. 16 NY 2d 488 (1965).

If *arguendo* the *Caminito* case is considered distinguishable from the instant case, then the instant case is more clearly distinguishable from all other New York malicious prosecution cases—none of these involved an *affirmed* conviction. Thus, if this case is not governed by *Caminito*, then it is one of first impression under New York law. Because of the *affirmed* conviction, the case is particularly suitable for the application of well-established New York principles of collateral estoppel. The instant claim of coercion was litigated on the *same* evidence—and the affirmed judgment necessarily included a finding that the confession was voluntary and credible. With the single exception of a *habeas corpus* proceeding, that finding is conclusive against this plaintiff in any other litigation.

CONCLUSION

It is respectfully submitted, for the reasons stated, that the panel's decision misinterprets New York law and should be vacated or, in the alternative, should be reviewed by this Court *en banc* and vacated.

November 14, 1974

Respectfully submitted,

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